

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

[Corrected Copy]

77-1420

To be argued by
JO ANN HARRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1420

UNITED STATES OF AMERICA,

Appellee,

—v.—

NICHOLAS RIZZI,

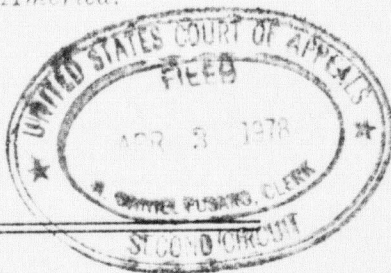
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

JO ANN HARRIS,
ROBERT J. JOSSEN,
Assistant United States Attorneys,
Of Counsel.



AFFIDAVIT OF MAILING

State of New York)
County of New York)

JO ANN HARRIS being duly sworn,
deposes and says that She is employed in the office of
the United States Attorney for the Southern District of
New York.

TM
2 copies

That on the *3^d* day of *April*
She served ~~a copy~~ of the within *brief (Corrected)*
by placing the same in a properly postpaid franked
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HENRY J. BOITEL, ESQ.
233 Broadway
New York, N.Y. 10007

And deponent further says that she sealed the said en-
velope and placed the same in the mail drop for
mailing *at* the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Jo Ann Harris

Sworn to before me this

3rd day of *April*, 1978,

Iola Krezic

IOLA KREZIC
Notary Public, State of New York
No. 52-4131670
Qualified in Queens County
Term Expires March 30, 1979



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**United States Court of Appeals
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Docket No. 77-1420

UNITED STATES OF AMERICA,

Appellee,

—v.—

NICHOLAS RIZZI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Nicholas Rizzi appeals from a judgment of conviction entered on October 6, 1977, in the United States District Court for the Southern District of New York, after a seven day trial before the Honorable Gerard L. Goettel, United States District Judge, and a jury.

Indictment 76 Cr. 1000, filed on October 28, 1976, in fifty-seven counts, charged Sylvan L. Sacolick and Rizzi in Count One with conspiracy to commit mail fraud, submit fraudulent claims, and make false statements in connection with a Medicaid supported Methadone Maintenance Program owned by Sacolick and operated by Rizzi, in violation of Title 18, United States Code, Section 371. The remaining counts of the Indictment charged Sacolick and Rizzi with substantive violations which were

the objects of the conspiracy: mail fraud, in violation of Title 18, United States Code, Section 1341 (Counts 2 through 26); filing fraudulent claims, in violation of Title 18, United States Code, Section 287 (Counts 27 through 31, 33 through 38, 40 through 44, 46 through 51); making false statements, in violation of Title 18, United States Code, Section 1001 (Counts 32, 39, 45, 52); and forgery, in violation of Title 18, United States Code, Section 495 (Counts 53 through 57).

Trial commenced against Rizzi alone on August 15, 1977.* At the end of the Government's case, Counts 53 through 57 were dismissed by the trial judge and Counts 32, 39, 45 and 52 were withdrawn by the Government as to Rizzi. On August 23, 1977, the jury found Rizzi guilty on each of the remaining 48 counts in the Indictment.

On October 6, 1977, Rizzi was sentenced, pursuant to Title 18, United States Code, Section 3651, to concurrent terms of three years imprisonment on each of Counts 1, 2, 27, 33, 40 and 46, and, with the provision that he be confined for a period of six months, execution of the remainder of the sentence was suspended and he was placed on probation for a period of three years.** Rizzi is presently free on bail pending appeal.

* Sacolick, a medical doctor, fled to Iran with the filing of the Indictment before he could be arraigned. A bench warrant issued for his arrest on November 1, 1976. He remains a fugitive in Iran at this time.

** Imposition of sentence was suspended for the remaining counts upon which Rizzi had been convicted.

Statement of Facts

The Government's Case

A. Synopsis

The scheme proved at trial involved the fraudulent obtaining of large amounts of Medicaid funds by the submission of extra charges for services otherwise covered under a basic Methadone Maintenance Treatment Program fee. In 1973, Dr. Sylvan L. Sacolick and Nicholas Rizzi, the administrator of his Program, embarked upon a plan by which they extended a previously legitimate Methadone Maintenance Treatment Program into one which defrauded Medicaid of thousands of dollars in charges for minor sundry medical care which Sacolick's and Rizzi's operation was required to provide to Medicaid patients as part of the basic Medicaid fee for the Methadone Program. Thus, although Sacolick's and Rizzi's Program was obligated to supply routine medical services to a methadone patient for a set daily Medicaid fee of \$4 per visit, they arranged to have other doctors—employed by the two with various arrangements—perform these same services, independently bill Medicaid for an additional fee, and then divided the proceeds of these double billings. The net effect of this scheme was to convert an already profitable, but legitimate, operation, into a fraud upon Medicaid which handsomely lined Sacolick's and Rizzi's pockets, at no cost either in time or money to them.

B. Background—The Methadone Maintenance Treatment Program and its Origins—1972

In the Summer of 1972 there were five or six private physicians in the City of New York licensed to dispense methadone as part of an experimental maintenance treat-

ment for heroin addiction.* (Tr. 646).** Dr. Sylvan L. Sacolick owned,*** and Nicholas Rizzi administered, two such Methadone Maintenance Treatment Programs. The first was located at 1175 Park Avenue, New York, New York ("the Park Avenue office"), where Sacolick shared offices with Dr. Jose Arandia, his partner in a professional corporation, Arandia-Sacolick, M.D., P.C. The second was located at 2369-71 Second Avenue, New York, New York ("the Second Avenue Program"). Both programs had a modest number of private patients, each of whom paid \$20 a week. (Tr. 479; 534). Nicholas Rizzi, earlier a patient himself at the methadone program (Tr. 507), was responsible for collecting the \$20 fee from each patient. (Tr. 595). For the \$20 fee, the Program provided a daily dose of orange juice or kool aid laced with methadone, which cost the program about 6 cents (Tr. 123-24), and Sacolick also attended to the patient's routine medical complaints (Tr. 546; 603; 605), chief among which were sweating and constipation, known side effects of the regular ingestion of methadone. (Tr. 116; 701-02).

Although originally no public monies had been committed to methadone maintenance treatment, in late 1971 New York State and City authorities had agreed in principle that the treatment should be included in the Medicaid Program as a reimbursable service. (Tr. 130-

* The methadone maintenance treatment concept involves controlled daily doses of methadone, itself an addictive drug, ingested orally under supervision. Administered in this fashion, methadone blocks the craving for heroin. (Tr. 111-17; 121-23).

** Citations preceded by "Tr." are to the trial transcript. "GX" stands for Government Exhibit. "Br." stands for Appellant's Brief.

*** Sacolick was the sole shareholder in Sylvan L. Sacolick, M.D., P.C., through which he handled his methadone treatment business. (Tr. 186-87).

31; 683). In November 1971, Sacolick and Rizzi, anticipating a major influx of Medicaid eligible enrollees, planned the Second Avenue Program. (Tr. 624-26). A draft agreement between them dated November 30, 1971, contained a sliding scale formula which contemplated an annual fee to Rizzi of \$53,000 for managing a program of 400 patients. (GX 38).*

The long awaited Medicaid reimbursement announcement was made in early September 1972, culminating a year of conferences in which authorities grappled with the problem of fitting into the rigid Medicaid fee structure a treatment concept which involved no medical service. (Tr. 130-33; 683). Since stripped to bare essentials, all methadone maintenance required was someone to dispense a 6¢ quaff of juice once a day, every day, to each person on the program, to justify an expenditure of public funds to a physician for such a continuing series of visits from a guaranteed clientele, something more was required. Thus it was decided that in addition to the methadone, itself, the treatment programs would have to provide routine medical care to Medicaid enrollees within the daily visit fee to be paid by Medicaid. (Tr. 681-85). In other words, treatment programs were required to provide the type of medical service Sacolick already had been providing his private methadone maintenance patients. With this proviso, a fee was fixed at \$4 per patient per visit, the going Medicaid rate paid to general

* GX 38 was a document produced by Rizzi in response to a Government subpoena *duces tecum* addressed to him as a corporate officer, calling for any and all corporate records reflecting, among other things, agreements between Sacolick and Rizzi. Under this agreement, Rizzi was to be employed as "Chief Executive Administrator, Office Manager, and Community Health Coordinator" for the Second Avenue Program.

practitioners for an office visit. (GX 34; Tr. 683).* Physicians operating Medicaid reimbursed methadone maintenance programs, therefore, were guaranteed \$24 per patient per week.**

The joint Department of Health/Department of Social Services Bulletin, dated September 1, 1972, announcing the \$4 rate and the applicable regulations, was mailed to all Medicaid eligible physicians in New York City. In addition, special mailings were made to those, such as Sacolick, already in the private business of methadone maintenance. (Tr. 98; 685). Among other things, the Bulletin emphasized the central point of complete services for the single daily fee: (GX 35)

"Medicaid will *not* reimburse the principal investigator,** or other physicians on the staff of the maintenance facility for office visits required to deliver medical care which would normally be within the competence of a general practitioner. It is expected that such care will be given during the patient's routine methadone maintenance visits, which are already reimbursed" (Emphasis in original).

* The professional methadone maintenance treatment community was dismayed with this rate from the beginning (Tr. 648-49), and doubtless, even unhappier when the rate for general practitioners was raised in March 1973, and the rate for methadone maintenance treatment was specifically held at \$4. (GX 36).

** Most methadone maintenance programs required patients to visit just six times a week to swallow their methadone under surveillance. Take-home doses were supplied for the seventh day.

*** At that time the official designation for the physician operating such programs was "principal investigator," a term in use by the Federal Drug Agency for its private licensees dispensing methadone through experimental programs. The term was later changed by Medicaid to "sponsoring physician."

Attached to the Bulletin was an "Application for Medicaid Approval" form which was to be filled in and returned by interested physicians. (Tr. 98-100). Sacolick responded immediately. His application was received by the Medicaid office on September 21, 1972, and on the same date a letter of approval was sent to him which also cited the governing regulations in the Bulletin of September 11, 1972.* (GX 1B).

C. Sacolick's Business Grows and Rizzi Forms "Enar"

With Medicaid funding now established, the business of the Second Avenue Program virtually exploded. From a program serving 50-60 private patients in September, by October 20, 1972, the Program had become exclusively a Medicaid program with the patient census hovering around 500. (Tr. 541: GX 67). The year ended with 618 Medicaid patients (Tr. 578-79), each of them trekking to the Second Avenue Program once a day, and, for every visit, generating a \$4 fee for the Program, a Medicaid disbursement of close to \$15,000 a week.**

In the interim, between Medicaid's approval of Sacolick's application in September and January 1973, Rizzi formed a corporation using a phonetic spelling of his initials, Enar Management Services, Inc. ("Enar"). In its certificate of incorporation, filed October 19, 1972, Rizzi was named as president and sole shareholder. The busi-

* This particular letter was sent to the Park Avenue office, but another similar letter, specifically approving the Second Avenue Program, was mailed to the Second Avenue address in the Fall of 1973. (GX 1C). Rizzi received and reviewed the incoming mail of this nature at Second Avenue, and Richard Yurasits, the Assistant Administrator of the Second Avenue Program testified at trial that he saw a copy of the Bulletin on Rizzi's desk. (Tr. 583-87).

** The Park Avenue Program remained private with only 30-40 patients.

ness of the corporation was to "engage in the business of office management and management consultant to those engaged in the medical professions." Services offered by the company were stated to include "billing of patients, scheduling of appointments, and supervision and installation of other clerical procedures to maintain and improve the efficiency of medical offices." (GX 40). Thereafter, Enar—whose sole client was the Second Avenue Program—began receiving monthly checks from Sylvan L. Sacolick, M.D., P.C. (Sacolick, P.C.), for Rizzi's management of the Program.* (GX 42A-42D).

For the balance of 1972 Sacolick alone was providing whatever routine medical care was given to the patients (Tr. 546), in compliance with Medicaid regulations. This practice however, soon was to change in early 1973 as greed pushed both Sacolick and Rizzi into a fraudulent scheme of huge dimensions.

D. The Fraud

1. The Hiring of Sahibzada, Javaid and Kamen

As 1973 began, Sacolick and Rizzi—through their respective solely owned corporations—were profiting mightily from the Medicaid boom. With the \$4 per patient daily billing, Sacolick's P.C. was receiving an average of \$50,000 a month from Medicaid (GX 13C-13G); Enar's fee payments from Sacolick's P.C. averaged about \$8,000 a month. (GX 43A-43D).

With this enormous growth in their practice, the task of providing day-to-day medical care for some 500 patients

* Rizzi told his accountant, Richard Kemna, that among his many responsibilities, he was in charge of a' the Second Avenue Program paper work, which justified a tax write-off of a portion of the expenses of his apartment, where he claimed he maintained an office. (Tr. 201).

was burdensome to Sacolick. In January 1973, Sacolick and Rizzi set out to recruit a staff physician or physicians to assume that required role and, at the same time, to provide a mechanism for obtaining further Medicaid funds. Classified advertisements, sometimes signed by Sacolick, sometimes by Rizzi, appeared in the New York Times exhorting internists experienced in "hi volume Medicaid practice" to apply for a six hour-a-day, five day-a-week job, promising a draw of \$30-40,000, with an incentive increment depending upon volume. (GX 45A-45I).

In late January, Dr. Afzal Hamid Sahibzada was the first of several physicians to respond to the advertisements. He soon learned from Sacolick, however, that he was not being offered a salary. Instead, Sacolick advised Sahibzada that Medicaid would be billed in Sahibzada's name every time a patient dropped into his office with a complaint; Sacolick's people would handle the Medicaid paper work; and for the privilege, Sahibzada would have to kick-back to Sacolick P.C., 40% of Sahibzada's Medicaid receipts. (Tr. 213-15).^{*} Sahibzada, educated in Pakistan and unfamiliar with Medicaid, readily agreed. (Tr. 208-10). He started working at the Second Avenue Program part-time, (Tr. 215-29), and soon brought in a medical-school friend of his, Dr. Khawata Ahmed Javaid, who also worked part-time. (Tr. 262). Javaid's financial arrangement was the same as Sahibzada's. (Tr. 263).

In March 1973, the classified ads produced Dr. George Kamen, an American physician unschooled in Medicaid practice but fascinated with drug treatment modes. He was interested in full-time work. (Tr. 331-44). The

^{*} Sacolick told him the problems he would be treating would be routine, for example the constipation and insomnia generally associated with methadone patients. (Tr. 212-13).

deal with Kamen was even more advantageous to Sacolick and Rizzi. Kamen was told he would be seeing 20-25 patients a day with the usual common complaints; Medicaid would be billed in Kamen's name for each visit, but Kamen's entire Medicaid receipts would be turned over to Sacolick P.C., and Kamen would be paid a mere salary of \$600 a week, plus an incentive payment for any patients over 125 each week. (Tr. 342-58; 408-10).

2. Defendants' Operation Takes on Medicaid Mill Proportions

During 1973, Sahibzada, Javaid and Kamen regularly saw Sacolick's patients in a small office next to Rizzi's at the Second Avenue Program. (Tr. 581-82; GX 60). After swallowing their doses of methadone under supervision (each time generating a legitimate billing to Medicaid of \$4 in Sacolick's name) patients then would line-up outside the doctor's office for regular and ordinary medical treatment by the attending physician, with each visit thereby generating a fraudulent billing to Medicaid of \$10 in the doctor's name. (Tr. 216; 264-65; 687-707; 713). Because Sahibzada, Javaid and Kamen were internists, under the Medicaid fee structure they were permitted to bill Medicaid \$10 per patient visit. With the billing in names other than Sacolick's, Medicaid had no reason to suspect that the invoices were for routine care to Sacolick's methadone maintenance patients.

For each patient the attending doctor made a rough diagnostic note on a piece of paper with the patient's Medicaid number on it, and turned the accumulated notes over to Rizzi or a staff member at the end of the day. (Tr. 216-18; 264-67; 345-48; 408). Rizzi was responsible for delivering the notes to the Park Avenue office where the clerical staff prepared the invoices and other forms for submission to Medicaid. (Tr. 488-94; 498). In Sahibzada's and Javaid's cases, they were then called to Park

Avenue to sign the completed invoices. (Tr. 218-19; 267-68). In Kamen's case, the volume became overwhelming, so Rizzi supplied Kamen with a pile of blank invoices and directed him to sign as many as he could when he had a spare moment. The signed blank invoices were returned to Rizzi who sent them to the Park Avenue office where pertinent billing information was added, before these invoices were forwarded to Medicaid without Kamen's perusal. (Tr. 351-54).

3. Sacolick Broadens the Fraud

Meantime, yet another scheme for generating concealed excess billing from Medicaid through the Second Avenue patients had been devised by Sacolick. He determined that every three or six months, each patient at the Second Avenue Program would be required to travel to the Park Avenue office for routine diagnostic testing and a physical examination. (Tr. 228-33; 369-70; 480-83; 572-76). Prior to May 1973, Sacolick himself performed these examinations, but convinced his partner, Dr. Jose Arandia, to permit them to be billed to Medicaid in Arandia's name, thereby generating more disguised fraudulent bills which averaged \$36 each, of which a conservative \$10 was for the routine physical examination. (Tr. 483-87). Sacolick tired of doing these exams himself in May, and then prevailed upon Sahibzada to perform them through July (Tr. 232-35), at which time Arandia himself agreed to do them. (Tr. 487). These examination sessions were held every Wednesday. Rizzi was responsible for selecting patients for the trip to the Park Avenue office each week and to send more patients if the assigned quota failed to show.* (Tr. 515-16; 572-76).

*The patients selected were denied their daily dose of methadone—to which they were physically addicted—until they returned from Park Avenue with proof that they had submitted to the examination. (GX. 59A-59C).

4. Sahibzada and Javaid Leave, but Kamen Continues

Sahibzada left the Program in the Summer of 1973, having generated a total of \$16,135 in Medicaid receipts, \$5,257 of which he turned over to Sacolick's P.C. (Tr. 729; 737). Javaid left for Florida soon after, having generated a total of \$6,289 in Medicaid receipts, \$2,648 of which he kicked-back to Sacolick and Rizzi. (Tr. 730; 737). Sacolick personally handled the Sahibzada transactions, accompanying him to a bank with the Medicaid checks in hand, where before Sahibzada was given his Medicaid money, he was required to pay the percentage to Sacolick. (Tr. 223-27). Rizzi handled the final Javaid transaction. Rizzi called him in Florida in September, 1973 when the Medicaid check addressed to Javaid arrived at the Second Avenue Program. Rizzi said the Medicaid check would be released to Javaid only upon receipt of Javaid's certified check for the required kick-back. At the same time Rizzi dictated to Javaid the amount of the required kick-back check. (Tr. 270-72).

After Sahibzada and Javaid left, Kamen continued in the Fall of 1973 to generate Medicaid checks averaging \$8,000 a month, (GX 22G-22I). Through July, 1974,* Kamen's Medicaid total was \$86,236, all of which he turned over to Sacolick's P.C. In turn, Kamen was paid a total of \$44,211 in salary—leaving a clear \$42,025 profit for the Second Avenue Program. (Tr. 731-32; 737-38).

Throughout Kamen's tenure in the Program Rizzi showed a particular interest in Kamen's business. He hounded Kamen to see more patients, complained that

* Kamen became ill in the Spring of 1974, was out of the office most of April and May, returned in June, and left July 5, 1974. (Tr. 367-69; GX. 7-10).

Kamen wasn't working fast enough. (Tr. 455-56; 467-69). And, when Kamen's Medicaid checks arrived by mail at the Second Avenue Program, they were usually handled by Rizzi. Rizzi brought them to Kamen in the doctor's office, slid them across the desk face down and told Kamen to sign them. Once when Kamen peeked and exclaimed at the amount of the check, Rizzi told him not to do that, that Kamen didn't want to know the amount, "it might bother you." * (Tr. 359-60; 440). After endorsement by Kamen, the checks were deposited in the Sacolick P.C. bank account (Tr. 77; 361-64), and a direct percentage paid to Enar by Sacolick P.C. **

5. Discontent With the Medicaid Program

Kamen's illness was not the only set-back which struck the Second Avenue Program in 1974. First, patient population steadily decreased, cutting into legitimate (and non-legitimate) revenues. Then, Medicaid announced that henceforth it would reduce its prepayment of gross billing from 95% to 75%, cutting into working capital (Tr. 599-600). ***

* On occasion, Kamen's checks would arrive at Second Avenue while Kamen was out sick. In the first of those instances, Sacolick and Rizzi, rather than signing Kamen's name on the back of the checks themselves, took the checks to Richard Yurasits, Assistant Administrator who was a patient in the Program, and directed him to sign Kamen's name on the back. In two further instances, Rizzi alone took the Kamen checks to Yurasits and directed Yurasits to endorse Kamen's name. (Tr. 610-14).

** See p. 16, *infra*.

*** Prepayment was a procedure available to all large Medicaid producers, instituted because under ordinary processing procedures it could take three months from submission of invoice to payment. Under prepayment, a percentage of the billing was paid—without processing—within two weeks of submission. (Tr. 50).

Meantime, discontent in the methadone maintenance treatment community about the \$4 rate structure* became widespread, focussing on the professed inability of the program to continue to provide, among other things, the required routine medical care for the \$4 rate. (Tr. 648-49; 660).

In the Spring of 1974, Al Schwartz, a Department of Health official, set out to temper the situation with a series of seminars attended by methadone maintenance program owners, administrators, and concerned City officials. Six seminars were held between April 1, 1973 and May 12, 1973. (GX 64). Rizzi attended at least some of them, as did Sacolick. (Tr. 598-99; 651; 662). In every meeting a major subject discussed and hotly debated, was the purported inability of the Programs to provide routine medical care within the \$4 rate. (Tr. 649-51; 660-62; 672-75).

Despite substantial discussion on the reimbursement rate nothing was resolved at the seminars. Soon thereafter, Sacolick, in a demonstration of unmitigated gall, sued New York City to increase the \$4 rate on behalf of an organization of medicaid methadone treatment programs. (Tr. 601-02, 670-71).**

6. The Arrival of Zane

Undeterred by all of the official attention on the subject, Rizzi and Sacolick set out to find a replacement for Kamen. Rizzi ran a new series of advertisements in the New York Times, similar to those originally used to recruit Kamen, Javaid and Sahibzada. (GX 45K-45N). In the interim, Sacolick selected Dr. Mircea Zane, a

* See footnote p. 6, *supra*.

** Around this time, Yurasits overheard Sacolick and Rizzi discussing financial problems in Rizzi's office. (Tr. 600).

Rumanian refugee, to fill-in. At Sacolick's request Zane had given routine gynecologic examinations at the Second Avenue Program in the Fall of 1973, under a kick-back arrangement similar to Sahibzada's and Javaid's. (Tr. 290-94). In the Spring and Summer of 1974, Sacolick and Rizzi prevailed upon him to return again and to substitute for the ailing Kamen. (Tr. 299-302; 309-10). Zane, too, was told that he would be treating routine complaints such as sore throats, rashes, dermititis, insomnia and nerves (Tr. 301), and, in fact, these were the precise type of medical problems he saw after joining the Second Avenue operation. (Tr. 301-02). The billing procedure was essentially the same as it had been for Sahibzada and Javaid, except that Rizzi, personally, brought the completed invoices to Zane for signature. (Tr. 300-03; 305).

Zane's last and biggest check arrived at the Second Avenue Program around July 10, 1974, and around July 29, 1974—three and a half months after he had attended the Schwartz seminars—Rizzi demanded his and Sacolick's percentage before he would give Zane's check to Zane. In total, Zane generated \$8,642 in Medical billings from which he kicked-back a total of \$3,713 to the Program. (Tr. 730-31; 737).

E. Rizzi's Stake

Rizzi, through Enar, was paid \$116,098 in professional fees by Sacolick P.C. during 1973 and 1974. (Tr. 739-40). During the same time period Rizzi quickly became the only visible partner in the Second Avenue Program, a fact which he repeatedly confided to others. Sacolick soon stopped visiting the Program on any regular basis. (Tr. 239; 273; 359-60). By 1974, his appearances were months apart. (Tr. 310-12; 594). However, Sacolick would meet once a week with Rizzi at the Park Avenue office (Tr. 595), and Rizzi was able to reach Sacolick at any time, while others could not. (Tr. 322-23). Rizzi,

in the meantime carried full responsibility for the operations of the Program (Tr. 239; 273; 314-15; 385; 390-91; 539-40), and he gained financially when the Program did, while his income was reduced when the Program faltered.

While the records of Sacolick P.C. and of Enar do not reveal the precise basis for Enar's fee, both Rizzi and Sacolick told Sahibzada that Rizzi was a joint-owner, a partner in Sacolick's business. (Tr. 239-41). Rizzi also told Yurasits that he was getting 15% of the Medicaid take, (Tr. 557-58), and the scanty Enar documents produced at trial confirmed that Rizzi was receiving a percentage of the Medicaid receipts. This percentage varied from time to time, from "15% of the gross . . . but never to exceed 30% of the net" (GX 39A), to "12% of the gross," plus a \$3 per head fee for certain kinds of patients (GX 39B), to 30% of the staff doctors' Medicaid receipts. (See GX 43o, 43P, 22L).*

In 1973 and 1974, under Rizzi's management, the Second Avenue Program received some \$839,737 from Medicaid, based on the permitted \$4 per patient per day billing in Sacolick's name. (Tr. 728). Contrary to Medicaid regulations, not one cent of that sum was disbursed for the staff doctors' salaries to provide the required routine medical care for patients. Instead, Medicaid unwittingly paid out an additional \$135,499 in the names of Drs. Sahibzada, Javaid, Kamen, Arandia and Zane for

*GX 43o is a Sacolick P.C. check to Enar, dated 4/12/74, on the left hand stub of which is written in Sacolick's handwriting: "thru 2/28/74, less 1057.50 reserve re Kamen pending." GX 43P is a Sacolick P.C. check to Enar, dated May 10, 1974, in the amount of \$1,057.50, on the left hand stub of which is written in Sacolick's handwriting: "Balance on account through 2/28/74." GX 22L is a Medicaid check addressed to Kamen, George, F., at Second Avenue, dated March 22, 1974, deposited in May, in the amount of \$3,525.00. \$1,057.50, the amount paid to Enar is exactly 30% of Kamen's check, or Rizzi's percentage of Kamen's business.

services manifestly within the competence of a general practitioner.* (Tr. 735). This \$135,499 from Medicaid not only served to compensate the doctors for their work in the amount of \$63,658, at no expense to the Second Avenue Program, but, further, provided a remaining \$53,643 windfall in kick-backs to the owner and to the administrator of the Program: Sacolick and Rizzi.

The Defense Case

Rizzi did not call any witnesses and presented no affirmative evidence.

ARGUMENT

The Evidence Was More Than Sufficient To Establish Rizzi's Guilty Knowledge.

Rizzi's sole claim on appeal is that the evidence was insufficient to establish his guilty knowledge.** Although defendant concedes that there was a Medicaid fraud of major proportions proved at the trial of this case, (Tr. 826, 828), and does not seriously dispute that the evidence showed his participation to have been essential to the success of the double-billing scheme, he contends that

* Sahibzada, Javaid, Kamen and Zane accounted for \$117,301 (Tr. 732). The excess billing by Arandia, figured conservatively, was \$18,198. (Tr. 733).

** Rizzi alludes to, but does not press here, a claim he made in the District Court that he could not be convicted as an aider and abettor while his co-defendant, the principal, remained an indicted but unconvicted fugitive. His forbearance is well advised, since the claim was wholly frivolous. *See, e.g., United States v. Deutsch*, 451 F. 2d 98, 118-19 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *United States v. Tropicano*, 418 F. 2d 1069, 1083 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

there were simple, easy explanations for his conduct which pointed to innocence rather than guilt. (Br. 16-17).

In advancing his position, Rizzi sets forth only a selective, truncated version of the evidence, and ignores the several well-settled principles of law which govern an appellate Court's review of the sufficiency of the evidence. Thus in reviewing pieces of the evidence in isolation, Rizzi fails to note that the question of guilty knowledge must be assessed with reference to the record as a whole. As this Court repeatedly has said, evidence of knowledge, viewed as a whole, acquires significance beyond that of its component parts. *United States v. Bottone*, 365 F.2d 389 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *United States v. Wisniewski*, 478 F.2d 274, 279-80 (2d Cir. 1973); *United States v. White*, 124 F.2d 181, 185 (2d Cir. 1941). Similarly, in stating the case from his own perspective Rizzi disregards the principle that on the question of sufficiency after a verdict of guilt the evidence must be viewed in the light most favorable to the Government. See, e.g., *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. AMREP Corp.*, 560 F.2d 539 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3425, (January 10, 1978). Finally, Rizzi conveniently overlooks the essential proposition that the Government's burden was one of producing evidence from which a jury, drawing justifiable inferences from the facts, reasonably might conclude guilt beyond a reasonable doubt. *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). There is no requirement that the inferences foreclose all hypotheses of innocence. *Holland v. United States*, 348 U.S. 121, 139-40 (1954); *United States v. Singleton*, 532 F.2d 199, 203 (2d Cir. 1976). See also, *United States v. Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States v. Sira-*

gusa, 450 F.2d 592, 596 (2d Cir. 1971), *cert. denied*, 405 U.S. 974 (1972).^{*} When these principles are given proper accord in reviewing the evidence, "to which was added the cement of common sense and human experience," *United States v. King*, 560 F.2d 122, 127 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3293, (November 1, 1977) it becomes manifest that defendant's claim must be rejected.

An analysis of the sufficiency of the evidence of Rizzi's knowing participation in the fraud must start with the basic, but persuasive fact that he was integrally involved in every stage of the Methadone Treatment Program and had an enormous personal stake in the financial success of the Second Avenue Program. Far from the "messenger-boy" characterization of his job, as suggested in defendant's appellate brief, the proof at trial plainly showed that Rizzi, as Executive Director of the Second Avenue Program, was responsible for the planning of day-to-day operations of the Program, the management of daily patient flow, the processing of all of the papers underlying the Medicaid claims, and, in part, for the recruitment and hiring of the staff doctors. Moreover, Rizzi

^{*} In light of Rizzi's assertion here that his conduct was easily explainable, it is significant that he chose to offer no defense. As Judge Friendly observed in *United States v. Frank*, 494 F. 2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974):

"[T]he self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version."

See also, *United States v. Parness*, 503 F. 2d 430, 437 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Here, where there was no exculpatory version offered by the defendant, the jury was entitled to draw inferences of knowledge and purposeful action from Rizzi's highly suspicious activities with the staff doctors working in the Program.

regularly held himself out to be not only an expert in health delivery services, but the partner and confidant of Sacolick--the latter a representation which Sacolick personally confirmed directly to others and indirectly by entrusting to Rizzi's charge the conduct of business.

Rizzi's intimate familiarity with every aspect of the Methadone Program was matched by his personal financial interest in the success of Sacolick's ventures. The Second Avenue Program's gross proceeds from Medicaid billings in 1973 and 1974 were almost \$1,000,000. From this amount Rizzi personally received, through Enar, the corporation he formed specifically to operate the Program, a total of \$116,078 in management fees. Furthermore, Rizzi's receipt of 30% of Dr. Kamen's Medicaid payments justified the ready inference that Rizzi was the beneficiary of a unique incentive system in which his fees, in part, were based on the amounts generated by each of the staff doctors involved.

In short, the evidence overwhelmingly demonstrated that Rizzi was not just an ordinary staff member,* but was a person playing a vital function in the scheme, with a special interest in, and a special knowledge of, the fiscal and medical structures of the methadone maintenance treatment business.** This proof, by itself, entitled the

* In contrast, Richard Yurasits, second in command as Assistant Director (and a patient at the Program), started at \$1 an hour and worked up to \$250 a week, plus free methadone. (Tr. 538-39).

** Of course, it was not necessary for the Government to prove that Rizzi had a direct financial interest in the scheme to support a conviction for aiding and abetting. See e.g., *United States v. Manna*, 353 F.2d 191, 192-93 (2d Cir. 1965), cert. denied, 384 U.S. 975 (1966); *United States v. Blazer*, 309 F.2d 92 (2d Cir. 1962). Nevertheless, the clear proof in this case that he enjoyed such a substantial interest supports the conclusion that Rizzi was a knowing participant in the fraud.

[Footnote continued on following page]

jury to conclude that by his position in the Program Rizzi had the opportunity,* need and every reason to know that Medicaid was being double-billed improperly for thousands of dollars worth of minor medical care services, which the Program was required to provide under the single treatment rate without additional charge to Medicaid.

Against this background of his responsibilities and financial interest in the program, Rizzi's specific actions take on special significance and further support the jury's conclusion of defendant's awareness of the scheme to perpetrate a fraud on Medicaid through excess billings.

First, Rizzi encouraged Kamen, the Program's full-time doctor throughout most of the period of the fraud, to see as many methadone patients as possible, all of whom were treated for no more than the side effects which accompany regular ingestion of methadone, and other minor ailments such as the common cold. Rizzi, himself a former methadone patient in Sacolick's private program, had personal knowledge both of the minor nature of the ailments the Program doctors were treating, and of the fact that the \$20 weekly fee he had

Rizzi in fact, was in a circumstance similar to that of Amos in *Bentel v. United States*, 13 F. 2d 327 (2d Cir.), *cert. denied*, 273 U.S. 713 (1926). In that case Amos claimed, as does Rizzi here, that his superiors never revealed the truth to him and that all he did was to rely upon their statements. The Court in *Bentel* upheld Amos' conviction, stating:

"[T]his was his business, at 25 per cent or so to himself on every sale made. He was not a humble servant; he had opportunity as the sales manager for a time to learn the truth; he was at headquarters, and the statements made . . . were of the kind that any man with a fair business sense of probabilities would have thought required much corroboration." *Id.* at 329

Surely, the same can be said of Rizzi in this case.

* Indeed, there was testimony that the applicable regulations had been seen on Rizzi's desk. (Tr. 583-87). See *supra*, p. 7n*.

paid to Sacolick covered methadone *and* routine care.* The compelling rational inference from this proof was that Rizzi could not have thought Medicaid would pay more money for less care; on the contrary, he knew that the medical care rendered by the staff doctors was to be included in the \$24 dollar a week Medicaid fee. Further, throughout 1973 and 1974, Rizzi was responsible for selecting the patients to be sent to the Park Avenue office for no ailment at all, but simply to undergo a routine physical check-up every three or six months, and, of course, thereby generating more fraudulent Medicaid billing. By thus producing volume Medicaid claims under the guise of independent consultations, Rizzi obviously was helping to line Sacolick's, and his own pockets with Medicaid money obtained by fraud.**

* Quite apart from his personal experiences as a methadone patient Rizzi also handled Zane's invoices, the rough diagnostic notes created by all of the doctors, and was responsible for all of patients' files. Those papers and files made evident, in plain English, diagnoses involving ailments which ranged, in the main, from constipation to insomnia to bad breath.

At trial Rizzi argued to the jury that only an expert could tell what kind of medical care was being given to the Second Avenue patients and whether it was within the competence of a general practitioner to treat. The jury resoundingly rejected the argument, as well it might have on the extreme facts of this case. It was plain to anybody blessed with a modicum of common sense, with which Rizzi was more than amply endowed, that most of the complaints involved were so trivial as to make unnecessary a visit to a doctor of any kind. Any layman would have concluded that such complaints as filed the program's medical records here were within the competence of a general practitioner. Indeed, any other plausible view of the evidence is hard to imagine and would "require a naiveté from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977).

** Defendant's argument is disingenuous in the extreme that his urgings of Kamen to see more patients per hour represented a conscientious concern for the patients' well-being. It goes without saying that if the patients really had been ill, more not

[Footnote continued on following page]

Second, Rizzi's handling of the Medicaid forms and checks with Dr. Kamen belie the present claim that defendant was an innocent dupe and underscore Rizzi's knowing participation in the fraud. The evidence that Rizzi kept Kamen supplied with piles of blank Medicaid invoices, to be signed in the doctor's spare moments, and later had these forms processed without any kind of review by Kamen, amounted to an irregular procedure of the highest order and smacked of the actions of an interested principal. The significance of this practice was further made apparent by the way Rizzi handled the Medicaid checks later sent to Kamen. After Rizzi removed these checks, in amounts as high as \$8,000, from the mail at the Second Avenue Program, he brought them to Kamen, who, as Rizzi knew, was a salaried employee of the program earning \$600 a week. Rizzi then presented the monthly checks to the doctor face-down and directed Kamen to endorse them. When Kamen tried to peek at the amount, Rizzi told him not to, that "it would only bother you." The jury certainly was entitled to find that these actions hardly were those of a man who lacked a knowledge of the pervasive fraudulent scheme. Moreover, when Kamen became ill and was not present at the Program when the checks arrived, Rizzi did not sign Kamen's name on the back, but took them to his underling, Richard Yurasits, and directed him to endorse the checks in Kamen's name. The jury well could find from this surreptitious conduct that Rizzi was aware that the doctor's checks were not above-board, and, indeed was so aware that he kept his own handwriting off the back of them.

less time with the doctor would have been indicated. Thus the jury plainly was entitled to infer that when Rizzi complained to Kamen that the doctor was too slow, and urged him to see more patients per hour, Rizzi was motivated by his own self-interest in the amount of Kamen's Medicaid gross, not in the welfare of the patients.

Third, the jury could not have overlooked the evidence of Rizzi's guilty knowledge explicit in his collection of the kick-backs from both Javaid in the Fall of 1973, and Zane in the Summer of 1974. In each case Rizzi advised the respective doctors that they would not get the moneys owed to them until the kick-backs first were paid. Certainly, there could not have been clearer evidence of Rizzi's knowledge of the fraud than his direct and specific efforts to exact the fruits of the illegal venture from these doctors.

Thus, the circumstantial proof of Rizzi's special situation and continuous conduct alone, more than justified as reasonable the inference of his full knowledge of the scheme and amply supported the jury's guilty verdict.*

* Indeed this Court recently has upheld convictions under attack for sufficiency on less compelling facts than established in this case. In *United States v. Iannelli*, 461 F.2d 483 (2d Cir.), cert. denied, 409 U.S. 980 (1972), for example, the conviction of Squires—who like Rizzi claimed to be a mere “strawman”—was upheld on the ground that his unquestioning participation in an obviously fraudulent loan transaction supported an inference of knowledge of irregularity. *Id.* at 486. Squires' participation involved a single transaction on a single date. The Court held from the single transaction alone, that the jury could infer knowledge of a far broader scheme. Rizzi's participation stretched over a period of almost two years during which he handled literally thousands of fraudulent claims and several kick-backs. Moreover, the evidence of Rizzi's knowledge was far more compelling than that of the defendant Katritsis' in *United States v. Hanlon*, 548 F.2d 1096 (2d Cir. 1977). In *Hanlon*, this Court found sufficient proof to support an inference of knowledge of the scheme from the confidant relationship between Katritsis and a principal, Amanatides, which included the former's “personal” typing for a latter. Similarly in *United States v. Buigues*, Dkt. No. 77-1249, slip op. 977 (2d Cir., January 6, 1978) this Court found that from Buigues' relationships with the person who made the false entries in the books, Buigues “must have known or it could be reasonably inferred that he knew its contents.” *Id.* at 983. Here, Rizzi, not only enjoyed a broader confidant relationship with Sacolick which justified the reasonable inference that he knew of the fraud, but also had independent knowledge of the fraud and directly shared in its benefits.

Finally, if there could have been a flicker of doubt left concerning Rizzi's knowledge, it was extinguished by direct evidence of his attendance at the Schwartz seminars in April and May of 1974. In these seminars, Rizzi simply could not have avoided hearing, over and over again, that Medicaid regulations *required the methadone maintenance programs to provide routine medical care within the \$4 per day rate.** Even after these Seminars, however, Rizzi continued his efforts in the scheme, thereby negating any claim that until then he had been an innocent dupe. Rizzi's persistent recruitment of Zane occurred in the months after the seminars and culminated with Rizzi's collection of Zane's last and biggest kick-back in mid-July 1974—long after Rizzi had unequivocal and actual knowledge of the fraudulent scheme in which he was participating.**

* Rizzi's statement of the facts conveniently ignores the testimony of Al Schwartz, the Health Department Official who organized and attended all the Seminars, and the testimony of Kenneth Bitz, another Program's administrator, who also attended all seminars. Both testified that every meeting degenerated into a discussion of the \$4 rate and the professed inability of the Programs to provide routine medical care within it. Both also testified that Rizzi had attended some of the Seminars, as did Yurasits who stated that he had accompanied Rizzi to at least one of them. (Tr. 598-99, 649-51, 660-62, 672-75).

** While the evidence summarized above plainly supports the jury's conclusion that Rizzi had direct knowledge of the fraud, even under defendant's view of the evidence a guilty verdict was warranted. Stated from defendant's best perspective, the facts here manifested at least a deliberate disregard for the fraud being perpetrated, in whose fruits Rizzi readily shared. Thus the jury properly could have concluded that any ignorance professed by Rizzi only was the result of a calculated design to keep from learning what the Medicaid regulations required of him in light of the kind of treatment the doctors were providing. Indeed on similar facts, this Court time and again has affirmed convictions on the ground that a person may not circumvent criminal sanctions "merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." See e.g., *United States v. Sarantos*, 455 F.2d 877, 881 (2d Cir. 1972); *United States v. Abrams*, 427 F.2d 86, 91 (2d Cir.), cert. denied, 400 U.S. 832 (1970).

In sum, the evidence fully warranted the jury's conclusion that Rizzi knowingly and willfully associated himself with the venture, participated in it as something that he wished to bring about, and sought by his actions to make it succeed. *United States v. Licursi*, 525 F.2d 1164, 1167 (2d Cir. 1975); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), quoted in *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). Appellant's claim of insufficiency on this record, therefore, must be rejected.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JO ANN HARRIS,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

